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Huang Ziling (W/China) v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-05(M)-326–08 OF 2017
ABDUL RAHMAN SEBLI, KAMARDIN HASHIM AND ZABARIAH MOHD JJCA
25 NOVEMBER 2019

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Criminal Procedure — Defence — Innocent carrier — Luggage bag of Chinese national ('accused') who flew into Malaysia found to contain large amount of methamphetamine hidden within marker pens — Accused denied knowledge of drugs and claimed she was merely transporting bag as paid errand for someone in China — Whether accused could claim to be 'innocent carrier' given highly suspicious nature of her errand — Whether accused guilty of 'wilful blindness' — Whether accused could not disclaim knowledge when she had opportunity to thoroughly check contents of bag at any time — Whether trial court not wrong to conclude accused fully aware of drugs in bag — Whether accused's defence bare denial — Whether accused failed to rebut presumption of mens rea possession under s 37(d) of Dangerous Drugs Act 1952 ('the DDA') — Whether accused failed to show she did not carry out any act of 'trafficking' as defined under s 2 of DDA

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The instant appeal by the appellant, a Chinese national, against her conviction and sentence of death on a charge of trafficking in 1,442.3g of methamphetamine turned on whether she was an innocent carrier. The appellant had just arrived at the Kuala Lumpur International Airport from Guangzhou, China, when a scan of her luggage bag ('P34') showed the presence of suspicious substances. A thorough search of the bag revealed methamphetamine wrapped in plastic and concealed within the tubing of 310 marker pens kept within several boxes. Alphabet toys and pencils were other items in P34. It was the appellant's defence, which she had also raised in her cautioned statement to police following her arrest, that a man named She Be in Guangzhou, China, had asked her to transport P34 to Kuala Lumpur for it to be collected at a hotel by someone whose identity was not revealed to her then. The appellant said She Be had paid her well to carry out the errand. She said before She Be handed her P34, which was at all times unlocked, she had a quick look at what was inside the bag and found there was an assortment of things, such as children's clothing, stationery and toys. The appellant said she never knew about the drugs hidden within the marker pens. The trial judge rejected the appellant's defence of being an innocent carrier and ruled that she had been wilfully blind to the probability that P34 contained drugs given the highly suspicious nature of the errand she was asked to do. The trial judge found that

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A the appellant had ample opportunity to thoroughly examine the contents of P34 if she had wanted to. Since she had physical custody and control of P34 which bore her name on the luggage tag, the trial judge invoked against her the presumption of mens rea possession under s 37(d) of the Dangerous Drugs Act 1952 ('the DDA'). The judge also ruled that the appellant's act of transporting B the drugs to Malaysia amounted to 'trafficking' under s 2 of the DDA. The appellant failed to rebut the s 37(d) presumption on balance of probabilities and also failed to raise a reasonable doubt as to the act of trafficking. Since the appellant did not call any witnesses at the trial to corroborate her story and did not provide the investigating officer with sufficient particulars to enable him to C investigate her version of events, the trial judge concluded that her defence was a bare denial and that the prosecution had proven its case against her beyond reasonable doubt.

D **Held**, dismissing the appeal and affirming the conviction and sentence:

(1) The appellant's act was an act of wilful blindness. Clearly, she had shut her eyes to the obvious. She did not care to know about the contents in P34 although the circumstances and the manner in which P34 was given to her to be delivered to someone in Malaysia were suspicious. The facts E of the case gave reason to be suspicious about the true nature of the appellant's trip to Malaysia but the appellant appeared not to be concerned. This court agreed with the trial judge that the only reasonable conclusion that could be drawn from the facts was that the appellant was fully aware of what she was carrying and was aware of the presence of the F drugs concealed in the marker pens in P34. The defence of innocent carrier therefore failed (see paras 65 & 67).

(2) The defence had a legal burden to disprove knowledge and it was the duty of the defence to have called She Be or the appellant's friend, Liang Ya Shui, to testify at the trial to corroborate her story. Otherwise, there was G no way for the trial court to verify the truthfulness of the appellant's story. Hence, there was no flaw in the trial judge disbelieving the appellant's narrative of the events that led her into possession of P34 (see paras 70–71).

H (3) There was no misdirection or error in the trial judge's finding that the appellant had failed to rebut the presumption of possession under s 37(d) of the DDA or to raise a reasonable doubt on the issue of trafficking. The trial judge also did not err in finding that the appellant had not raised any reasonable doubt as to her guilt (see para 75).

I **[Bahasa Malaysia summary**

Rayuan ini oleh perayu, seorang warganegara China, terhadap sabitan dan hukuman mati terhadap tuduhan mengedar 1,442.3g methamphetamine sama ada beliau adalah pembawa tidak bersalah. Perayu baru sahaja tiba di

Lapangan Terbang Antarabangsa Kuala Lumpur dari Guangzhou, China, apabila imbasan beg bagasi ('P34') menunjukkan terdapat bahan yang mencurigakan. Semakan menyeluruh beg tersebut mendedahkan bahawa methamphetamine dibungkus di dalam plastik dan disembunyikan dalam tiub 310 pen marker yang disimpan di dalam beberapa kotak. Permainan abjad dan pensel adalah item lain dalam P34. Ianya adalah pembelaan perayu, yang juga dibangkitkan dalam kenyataannya kepada polis selepas penangkapannya, bahawa seorang lelaki bernama She Be di Guangzhou, China, telah meminta beliau untuk mengangkut P34 ke Kuala Lumpur untuk diambil di sebuah hotel oleh seseorang yang identitinya tidak didedahkan kepada beliau. Perayu berkata, She Be telah membayarnya dengan lumayan untuk menjalankan tugasan tersebut. Beliau berkata sebelum She Be menyerahkan P34, yang pada setiap masa tidak berkunci, beliau sempat melihat dengan sekali imbas apa yang ada di dalam beg itu dan mendapati ada pelbagai jenis barang, seperti pakaian kanak-kanak, alat tulis dan permainan. Perayu berkata beliau tidak pernah tahu tentang dadah yang tersembunyi di dalam pen marker. Hakim perbicaraan menolak pembelaan perayu sebagai pembawa tidak bersalah dan memutuskan bahawa beliau telah dengan kerelaan terhadap kebarangkalian bahawa P34 mengandungi dadah memandangkan sifatnya yang sangat mencurigakan terhadap tugasan yang diminta dilakukan oleh beliau. Hakim perbicaraan mendapati bahawa perayu mempunyai peluang yang mencukupi untuk memeriksa kandungan P34 dengan teliti jika beliau mahu. Oleh kerana dia mempunyai hak penjagaan fizikal dan kawalan P34 yang menanggung namanya pada tag bagasi, hakim perbicaraan telah mengguna pakai anggapan bahawa beliau mempunyai mens rea pengedaran dadah di bawah s 37(d) Akta Dadah Berbahaya 1952 ('ADB'). Hakim juga memutuskan bahawa tindakan perayu membawa dadah ke Malaysia terjumlah kepada'pengedaran' di bawah s 2 ADB. Perayu gagal menyangkal s 37(d) anggapan terhadap imbangan kebarangkalian dan juga gagal menimbulkan keraguan munasabah mengenai perbuatan pengedaran. Oleh kerana perayu tidak memanggil mana-mana saksi di perbicaraan untuk menyokong cerita beliau dan tidak memberikan pegawai penyiasat dengan butir-butir yang mencukupi untuk membolehkannya menyiasat versi kejadian beliau, hakim perbicaraan menyimpulkan bahawa pembelaannya adalah penafian kosong semata-mata dan bahawa pendakwaan telah membuktikan kes terhadapnya melampaui keraguan munasabah.

Diputuskan, menolak rayuan itu dan mengesahkan sabitan dan hukuman:

(1) Tindakan perayu adalah tindakan 'wilfull blindness'. Jelas, beliau menutup mata beliau terhadap kebenaran. Beliau tidak peduli untuk mengetahui kandungan dalam P34 walaupun keadaan dan cara P34 diberikan kepadanya untuk diserahkan kepada seseorang di Malaysia adalah mencurigakan. Fakta kes itu memberikan sebab untuk mencurigai tentang sifat sebenar perjalanan perayu ke Malaysia tetapi perayu kelihatan tidak mengambil berat. Mahkamah ini bersetuju

dengan hakim perbicaraan bahawa satu-satunya kesimpulan yang munasabah yang boleh diambil dari fakta adalah bahawa perayu sedar sepenuhnya tentang apa yang beliau bawa dan sedar akan kehadiran dadah yang disembunyikan dalam pen marker dalam P34. Oleh itu pembelaan pengedar yang suci hati gagal (lihat perenggan 65 & 67).

(2) Pihak pembelaan mempunyai beban undang-undang untuk menyangkal pengetahuan dan menjadi kewajipan pembelaan untuk memanggil She Be atau kawan perayu, Liang Ya Shui, untuk memberikan keterangan semasa perbicaraan untuk menguatkan kisah beliau. Jika tidak, tidak ada cara untuk mahkamah perbicaraan mengesahkan kebenaran kisah perayu. Oleh itu, tidak ada kekhilafan hakim perbicaraan yang tidak mempercayai naratif perayu tentang kejadian yang membawa kepada pemilikan P34 (lihat perenggan 70–71).

(3) Tiada kesilapan atau kekhilafan terhadap dapatan hakim perbicaraan bahawa perayu telah gagal menyangkal anggapan pemilikan di bawah s 37(d) ADB atau menimbulkan keraguan munasabah mengenai isu pengedaran dadah. Hakim perbicaraan juga tidak terkhilaf dalam membuat dapatan bahawa perayu gagal menimbulkan keraguan munasabah terhadap kesalahannya (lihat perenggan 75).]

Cases referred to

Agus bin Agil v PP [2011] 4 MLJ 442; [2010] 9 CLJ 125, CA (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)
Deon Jacobus Alfred Cornelius v PP [2016] MLJU 1564; [2016] 1 LNS 354, CA (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Koh Tiong Hock v PP [2011] 4 MLJ 40; [2011] 2 CLJ 377, CA (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70; [1993] 3 CLJ 113, SC (refd)
PP v Lim Hock Boon [2009] 3 MLJ 604; [2009] 3 CLJ 430, FC (refd)
Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)
Tobechi Chinonso Madu v PP [2015] MLJU 2038; [2015] 1 LNS 57, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1), (1)(a), First Schedule

Appeal from: Criminal Trial No 45A-125–11 of 2014 (High Court, Shah Alam)

Tina Ong (Tina Ong & Syazlin Mansor) for the appellant.
Faizah bt Mohd Salleh (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabariah Mohd JCA:

[1] The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952') as follows:

> Bahawa kamu pada 7 Januari 2014, lebih kurang jam 11.50 malam, di Cawangan Pemeriksaan Penumpang 1 (CPP1), Balai Ketibaan Antarabangsa, Lapangan Terbang Antarabangsa Kuala Lumpur (KLIA), di dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1,442.3 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the learned trial judge found the appellant guilty of the offence charged, convicted the appellant and sentenced her to death. Aggrieved, the appellant appealed, which is the appeal before us.

[3] After hearing submissions from both parties and perusing through the appeal records, and given the appeal our utmost thoughts and consideration, unanimously we found that there is no appealable error on the part of the learned trial judge. The conviction and sentence imposed by the learned trial judge under the DDA 1952 is safe. We affirmed the decision of the learned trial judge. Herein below are our reasons for deciding so which shall form the judgment of this court.

BACKGROUND

[4] The appellant arrived at Kuala Lumpur International Airport ('KLIA') via China Southern Liner Flight CZ365 from Guangzhou, China on 7 January 2014 at about 11.50pm.

[5] Custom's Officer, Muhammad Faissal bin Saimin ('PW6') who was on duty at the scanner machine 'B', at Cawangan Pemeriksaan Penumpang 1 ('CPP1'), Balai Ketibaan Antarabangsa KLIA said in evidence that on 7 January 2014, he spotted the appellant. The appellant was seen with her luggage ('P34') and carrying a handbag ('P35') heading towards the scanner.

[6] PW6 instructed the appellant to have P34 and P35 scanned. The appellant placed P34 and P35 into the scanner machine. PW6 and his colleague Mohd Muzamir bin Sahimi ('PW7'), noticed suspicious green images in P34 when the same was scanned. PW6 asked the appellant about the contents of P34 but the appellant did not answer, however the appellant attempted to open the luggage, P34 when she was instructed by PW6 to go to counter 'B' for luggage examination.

A **[7]** PW6 instructed the appellant to open P34 which was unlocked. The appellant opened P34 and PW7 discovered some alphabet toys, pencils and boxes of marker pens. PW6 took out the boxes of marker pens and had them scanned, when PW7 again noticed some green images appeared on the scanner machine. PW7 later opened one of the boxes and took out few marker pens to B be scanned again and the suspicious green images appeared in the scanner machine. PW7 discovered that the marker pens were not new and the ink were faded.

C **[8]** Upon PW7 opening the cap and the clamp ring of one of the marker pens, he discovered a black plastic packet in the body of the marker pen. PW7 pressed the plastic package using his fingers and it felt like pebble texture. PW7 took out the package and discovered that the package contained white crystal powder.

D **[9]** PW7 later placed back the boxes of the marker pens into P34 and the appellant was brought to Bilik Pejabat CPP1 for further investigation. The appellant went together with PW6 and PW7.

E **[10]** The appellant never protested and when asked by PW6 whether someone would pick her up, she answered in the negative and said that she wanted to go to a hotel but could not give the name of the hotel and said that the name of the hotel would be messaged to her in her handphone by someone called She Be.

F **[11]** At 1.30am on 8 January 2014, the investigation officer, Muhammad Farhan bin Izhar ('PW8') came with his team at Bilik CCP 1. PW7 continued with inspection of P34 and found 28 boxes containing 310 marker pens. PW7 proceeded to open all the maker pens and in each marker pen there was a black G plastic packet wherein contained white crystal powder (P41(1–6)–P68(1–6). Initial tests done on samples taken from the white crystal powder indicated that it was methamphetamine.

[12] PW7 seized all the items including two mobile phones and an iPad H from the appellant and later marked all the items, prepared a search list and lodged a joint police report with PW6. PW7 subsequently instructed Amirool Suffy bin Sulaiman ('PW4') to take photographs of the exhibits.

[13] The appellant and the items seized were handed over to PW8 and the I incriminating substances were sent to the chemist for analysis, who later confirmed that all the white crystal substance analysed contained 1,442.3g of methamphetamine.

[14] The investigating officer sent the two mobile phones and the iPad for

forensic examination. He received the report on the forensic examination ('P25') from the forensic unit. There was no relevant information for him to pursue further investigation in relation to the incoming and outgoing numbers which were recorded in the report.

[15] The learned trial judge found that a prima facie case had been made out against the appellant and called upon the appellant to enter her defence.

[16] The defence of the appellant was that she was carrying the luggage as instructed by her employer called She Be (a male Nigerian) from Guangzhou China to Malaysia. She Be had offered her a job with a monthly salary of 10,000 Chinese Yuan to transport childrens' things and clothes to places outside of China. The appellant accepted the job offer.

[17] On 7 January 2014 the appellant was informed by She Be via telephone that she was to go to Malaysia but before her trip, they were to meet up at a restaurant in Guangzhou, China. The appellant met up with She Be at the said restaurant around 12.30pm. The appellant brought with her a luggage bag and a sling bag ('P35') together with a friend, Liang Ya Shui to accompany her.

[18] At the restaurant, an employee of She Be, also a black man, appeared with a luggage and this was later handed over to the appellant, which was identified as P34 in court.

[19] However, before handing over the luggage P34 to the appellant, She Be opened the luggage and through a small opening, She Be showed to the appellant what was inside the luggage bag, P34. The appellant through the small opening saw the luggage contained stationaries when it was opened momentarily by She Be before the luggage P34 was handed over to her. At the restaurant She Be had informed the appellant that the luggage, P34 was intended for a customer whom she was supposed to meet at a hotel in Malaysia. The details of the customer was not informed to the appellant.

[20] She Be did not inform the appellant what was the exact contents of the luggage P34 and neither did the appellant ask from She Be as She Be was her employer. In addition She Be had informed the appellant that her flight was at 2.20pm and that there was not enough time to check the contents of the luggage P34 then.

[21] The appellant had to rush to the airport with her friend and upon reaching the airport she checked in the luggage P34. The appellant handed over to her friend her own luggage bag which she had brought earlier, to be brought back as She Be had told her that only one luggage was permitted to be carried on the flight. The appellant only brought her sling bag, P35, with her, with

some personal items and a clothing in the said sling bag. She Be did not accompany the appellant to the airport.

[22] The name of the hotel in Malaysia was sent via SMS to the appellant's phone. This is evident in the handphone, which was seized from the appellant, which states 'Parkway Inn Hotel, Sungai Long, Cheras, Kuala Lumpur'.

[23] The appellant took the flight from Guangzhou, China to Malaysia via China Southern Liner CZ 365 flight. The appellant reached KLIA Malaysia on 7 January 2014 at 11.50pm where subsequently she was arrested.

FINDINGS OF THE LEARNED TRIAL JUDGE

[24] The learned trial judge found that the evidence of PW5, the government chemist was not seriously challenged and hence it established that the white crystal substance found in the marker pens in the luggage P34 contained 1,442.3g of methamphetamine, dangerous drugs listed in the First Schedule of the DDA 1952.

[25] PW6 and PW7 were found to be credible witnesses and from their testimonies, it was established that the appellant was found to have physical custody and control of the luggage bag P34. The appellant was seen lugging the luggage P34 alone and the luggage tag (P3) found on the same bore the name of the appellant, indicating that the appellant had checked in the luggage bag, P34 at the airport as belonging to her. The learned trial judge found no reason to doubt the credibility of the prosecution witnesses as they have no reason to falsely implicate the appellant with drugs in the luggage bag as they did not know her and discovered the same during their routine checks of the passengers' luggage.

[26] The learned trial judge relied on the presumption of knowledge under s 37(d) of the DDA 1952. The appellant was deemed to have possession and knowledge of the nature of the drugs found in the luggage bag, P34.

[27] The learned trial judge found that the argument of the defence that the conduct of the appellant in cooperating with the enforcement officers when apprehended by PW6 and PW7 indicated that the appellant had no knowledge of the drugs in the luggage bag, and thus was sufficient to rebut the presumption under s 37(d) of the DDA 1952, has no merits and contrary to the principle as laid down by the Supreme Court in *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70; [1993] 3 CLJ 113 when it held that:

> To elaborate, the conduct and demeanour of an accused may well be relevant and may therefore be taken into consideration when considering what weight should be accorded to the defence version but it should not by themselves be sufficient to

rebut a statutory presumption which has been raised against an accused person. A

[28] The evidence showed that the appellant was arrested in the act of carrying or transporting a large amount of drugs from Guangzhou China to Kuala Lumpur. The learned trial judge held that the act of the appellant fell within the definition of 'Trafficking' under s 2 of the DDA 1952, when she transported the drugs from Guangzhou, China to Kuala Lumpur for the purposes of distribution. B

[29] The appellant could not have had such a large quantity of drugs in her possession and control, meant for personal consumption, save for the purpose of trafficking it to others known or unknown. The appellant herself best knows why she was conveying the drugs from China to Malaysia. C

[30] The learned trial judge dismissed the contention that the investigating officer, PW8 failed to verify the appellant's narration based on her cautioned statement. PW8 testified that there were insufficient particulars given to PW8 to enable him to verify the appellant's story. This court had dealt with a similar issue in the case of *Tobechi Chinonso Madu v Public Prosecutor* [2015] MLJU 2038; [2015] 1 LNS 57 where observations were made: D E

> The mere fact that Ossy's name was mentioned during police investigation is not evidence that Ossy actually exists. How were the police to investigate the existence of this person when the appellant did not even give his full name and his residential address? The poor investigating officer may end up chasing a wild goose. We therefore found no merit in the appellant's argument that the police's failure to investigate the existence of Ossy must be held against the prosecution. F
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> In any event, since the appellant had the legal burden to discharge (to disprove knowledge) it was his duty to call Ossy to give evidence and not for the police to investigate if it was true that Ossy had asked him to carry the soap boxes: *Baharom v PP* [1960] MLJ 429; *Liew Siew & Anor v PP* [1969] 1 LNS 90; *Chu Tak Fai v PP* [1998] 4 CLJ 789. Hence, since Ossy was not called to give evidence there was no way the court could verify the truth of what Ossy told him at Lagos Airport. In fact the evidence is hearsay and inadmissible as the object was to prove the truth of what Ossy told him: *PP v Subramaniam* [1965] MLJ 220 (PC). G H

[31] The learned trial judge, upon a maximum evaluation of the evidence adduced by the prosecution held that a prima facie case had been made out against the appellant in respect of the charge which, if unrebutted, would warrant a conviction. Hence Her Ladyship called the appellant to enter her defence. I

[32] The learned trial judge analysed the defence and found that essentially the appellant claimed to be an innocent carrier 'That from the beginning to end, she was led by the nose and did not know and did not suspect there were

drugs in the luggage bag given to her by She Be'.

[33] The learned trial judge did not give any credence to her defence and held that the defence of the appellant was in essence a bare denial and no weight could be given to her version as neither She Be nor Liang Ya Shui were called to give evidence to support the appellant's story.

[34] On the question of knowledge, the learned trial judge referred to the submission by the defence that referred to the willingness of the appellant to open the luggage bag when she was queried by PW6 about the contents of the luggage P34 and a message ('SMS') which the appellant had sent to her boyfriend after her arrest wherein she had stated that she was in trouble and had been cheated, which could be inferred that she had no knowledge of the presence of the drugs in P34. The learned trial judge found no merit in such argument as it was unsupported by authorities and the learned trial judge referred to this court's decision in *Deon Jacobus Alfred Cornelius v Public Prosecutor* [2016] MLJU 1564; [2016] 1 LNS 354 which held that the conduct of an accused person per se was not conclusive in the determination of his innocence.

[35] The learned trial judge considered the likelihood that even if the appellant's account of how she came into possession of the luggage bag was true, it was odd that the appellant was not suspicious of the contents of the luggage bag, P34. The appellant hardly knew She Be nor the nature of the business of his company. He offered her a salary that was three times more than what she had earned as a waitress. The learned trial judge held that 'The surreptitious manner in which he put her on the flight to Kuala Lumpur with the luggage bag was so suspect that any reasonable person would have gone one step further and ascertained for himself what precisely was in the luggage bag. This, the appellant had failed to do. The only reason why she failed to do so was because she either knew that drugs were concealed in the luggage bag or she did not care to know' (p 31 *RR Jld* 1). The learned trial judge found that the conduct of the appellant in not wanting to check the contents of the luggage bag, P34 amounted to wilful blindness.

[36] The appellant merely denied knowledge. She failed to prove that she was not guilty of wilful blindness as she failed to prove that there were no reason to believe that she was carrying drugs in her possession.

[37] The learned trial judge disbelieved the appellant version that a man she hardly knew, She Be, had given her the luggage, P34. She also had ample opportunity to check the contents of the luggage bag, P34 on the way to the airport, yet she failed to do so.

[38] The defence of the appellant was a bare denial and the learned trial judge did not give weight to such defence. Given the aforesaid, the learned trial judge held that the appellant failed to rebut the statutory presumption of possession under s 37(d) of the DDA 1952 on a balance of probabilities. The learned trial judge also held that the appellant has not raised any reasonable doubt as to her act of trafficking. The learned trial judge was satisfied that the prosecution had proved the charge against the appellant under s 39B(1)(a) of the DDA 1952 beyond reasonable doubt.

OUR FINDINGS

Whether a prima facie case had been made out

[39] The learned trial judge held that a prima facie case had been made out by the prosecution when the prosecution had proved the elements of the charge which resulted in her calling for the defence to be entered by the appellant.

[40] The appellant was charged for trafficking under s 39B(1)(a) of the DDA 1952. It is incumbent on the prosecution to prove that:

(a) the appellant at the time and place as stated in the charge did traffic in the drugs;

(b) the appellant had possession and knowledge of the drugs; and

(c) the weight of the drugs is 1,442.3g of methamphetamine.

The subject matter is drugs

[41] The prosecution had called the chemist PW5 to confirm that the white crystal powder that was found were dangerous drugs as listed under the First Schedule of the DDA 1952. The evidence of the chemist was never challenged. Hence it was established that the dangerous drugs were methamphetamine weighing 1,442.3g as per charge.

Whether 'trafficking' has been made out

[42] The learned trial judge relied on s 2 of the DDA 1952 to make a finding that the act of the appellant fell within the definition of 'trafficking' under s 2 of the DDA 1952. Section 2 defines 'trafficking' as:

> ... includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

[43] PW6, the custom officer who manned the scanning machine at the relevant time saw the appellant with her luggage, P34 and a handbag P35 and that the appellant later placed P34 on the scanning machine. The bag tag on P34 bore the name of the appellant. The appellant had just arrived from Guangzhou, China to Kuala Lumpur via a flight around 11.40pm. The drugs were found in the luggage, P34.

[44] The learned trial judge found that from the aforesaid evidence, it showed that the appellant was arrested in the act of conveying and transporting a large amount of drugs from Guangzhou to Kuala Lumpur. Therefore such 'conveyance and transporting' act of the appellant carrying the luggage P34 falls within the category of 'trafficker' under s 2 of the DDA 1952.

[45] We found that the learned trial judge did not err in her findings in this respect. Lord Diplock at pp 68H–69A in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 had the occasion to elaborate on the meaning of 'transporting' of drugs:

> It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so. Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport', to which attention has been drawn, attracts the maxim *noscitur a sociis*. This, and the fact that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another.

[46] The act of carrying/keeping/concealing, amongst others is also within the definition of 'trafficking'. The evidence also show that the act of the appellant can amount to 'concealing and carrying' the said drugs from Guangzhou to Kuala Lumpur which also fall within the definition. The fact that the drugs were hidden in the 310 black plastic packets (P41(1–6)–P68(1–6)) in marker pens showed the element of 'concealing' and 'keeping' which also constitute trafficking under s 2 of the DDA 1952.

[47] The Federal Court in *Public Prosecutor v Lim Hock Boon* [2009] 3 MLJ 604 at p 628; [2009] 3 CLJ 430 at p 458 acknowledged that the prosecution may bring its case under any of the acts stipulated under the definition of 'trafficking' under s 2 of the DDA 1952. However *Agus bin Agil v Public Prosecutor* [2011] 4 MLJ 442; [2010] 9 CLJ 125 elaborates further on the application of s 2 of the DDA 1952 as to the words 'concealing and carrying' when this court held that:

It is trite law that mere keeping, concealing or carrying of the drugs is not sufficient to constitute trafficking. However, in *Ong Ah Chuan*'s case Lord Diplock also said at p 69 that:

> Proof of the purpose of which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, *in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would in the absence of any plausible explanation by him, be irresistible even if there were no statutory presumption* such as is contained in s 15 of the Drugs Act.

As a matter of common sense *the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it*. (Emphasis added.)

[48] Therefore, given the aforesaid, as the quantity of drugs is very large, namely 1,442.3g, larger than what is likely intended for own personal consumption, the strong inference that the appellant was transporting the drugs for the purpose of trafficking, in the absence of any plausible explanation by the appellant, is irresistible.

[49] In *Koh Tiong Hock v Public Prosecutor* [2011] 4 MLJ 40 at p 50; [2011] 2 CLJ 377 at p 390, this court held that, for offences under s 39B(1) of the DDA 1952, it is irrelevant to the guilt of the appellant whether the purpose of the appellant transporting the drugs for distribution was achieved or not as the gist of the offence is the transporting of the drugs for the purpose of distribution, irrespective of the success of distribution.

[50] Hence it is clear, there is no doubt that the act of carrying of the luggage P34 which contained the impugned drugs from Guangzhou to Kuala Lumpur by the appellant falls within the definition of 'trafficking' under s 2 of the DDA 1952. This is fortified by the fact of the large quantity of the drugs found in 310 marker pens inside the luggage bag P34 which gave a strong inference that the appellant was trafficking in drugs. The learned trial judge did nor err when she held that the appellant in transporting and carrying the drugs from Guangzhou, China to Kuala Lumpur commit the act of trafficking which fell within the definition of s 2 of the DDA 1952.

Whether the appellant had possession and knowledge of the drugs

[51] The testimony from PW6 and PW7 show that the appellant had physical and exclusive custody and control of the luggage P34 which contained

310 black plastic packages as in P41(1–6) and P68(1–6) which contained white crystal substances in 310 marker pens P97(1–6) and P124(1–6) in 28 boxes of marker pens which had been confirmed by PW5, the government chemist as methamphetamine.

[52] Throughout the prosecution's case there was no suggestion that anyone else was with the appellant at the material time at the KLIA. It was not denied that she was alone at that time. The luggage tag, P3 for P34 bore the name of the appellant.

[53] The question is whether the appellant had knowledge of the presence of the drugs in the luggage. The manner in which the drugs were placed was very well hidden in marker pens, the inference that could be drawn was to avoid detection from the authorities. It was packed in plastic packages very well concealed in the marker pens which were not new which contained faded inks. These marker pens were brought all the way from Guangzhou China to Kuala Lumpur. It is also to be noted that the luggage bag P34 was the bag specially given to the appellant by She Be. The appellant's own luggage bag which she had brought before she met up with She Be at the airport, was left with her friend before she took the flight to Kuala Lumpur as she was told by She Be that she could not take another luggage to Kuala Lumpur.

[54] It was also in evidence that She Be only opened the bag slightly to show to the appellant the contents but the appellant never bothered to check the contents further although she had ample opportunity to check on the way to the airport, which she failed to do.

[55] The learned trial judge relied on the presumption under s 37(d) of the DDA 1952 in that if a person in which is found to have in his custody or under his control anything whatsoever containing any dangerous drugs shall be deemed to have in his possession of such drug and shall be deemed to have known the nature of the drugs. The appellant in our present case is proven to have exclusive physical custody and control over the luggage P34 including the drugs concealed in 310 black plastic packets P41(1–16)–P68(1–6) in 310 marker pen P97(1–6)–P124(1–6) inside the luggage P34 at the material time, therefore the learned trial judge was entitled to invoke the presumption under s 37(d) of the DDA 1952 against the appellant where she was presumed to have possession and knowledge of the drugs found inside the luggage.

Message found in the handphone of the appellant

[56] On the issue of the evidence of the message which was found in the handphone of the appellant which was seized by the police, which states 'Parkway Inn Hotel, Sungai Long, Cheras, Kuala Lumpur'; PW8 had stated in

the analysis report by forensic unit (P25) there was insufficient particulars for him to follow up with further investigation. PW8 had explained that although item 18 of P25 had stated 'Parkway Inn Hotel, Sungai Long, Cheras, Kuala Lumpur', there were no details given by the appellant as to the name of the person who made the booking/reservation of the hotel and the booking period.

[57] The analysis report (P25) further showed the telephone number 134356112369 which was the number that had sent the message that contained the name of the hotel, was an international number where PW8, the investigating officer had no jurisdiction to investigate. In addition he could not go overseas to investigate She Be. There was no record of any local number that he could made contact for purposes of investigation. The name of She Be as explained by the Chinese interpreter during the trial was spelled out as 'Xue Bi' in Chinese characters. PW8 could not confirmed whether 'Xue Bi' and 'She Be' which the appellant stated in her cautioned statement referred to the same person. Hence PW8 was limited in his investigation due to insufficient particulars and details given by the appellant apart from the name of She Be and the hotel. The appellant also could not give the name of the person/individual she was supposed to meet and handed over the luggage bag, P34 upon her arrival in Malaysia.

[58] After the learned trial judge found that the prosecution witnesses were credible and she had no doubt as to their narration of the events that led to the arrest of the appellant and the recovery of the drugs and that all the elements of the charge had been proven, we found that the learned trial judge did not err when she found that a prima facie case was made out against the appellant.

Whether the learned trial judge had considered and evaluated the defence of the appellant

[59] The defence submitted that the appellant's explanation in court is not an afterthought defence and ought to be accepted by this court as the cautioned statement of the appellant ('D127') corroborates her evidence in court. In fact according to the defence, D127 was in fact tendered at the stage of the prosecution's case, and it was exculpatory in nature.

[60] There is no doubt that D127 was tendered at the prosecution's stage by the defence. However, in this regard, it is trite law that at the prosecution's stage, the cautioned statement cannot be a basis for an acquittal as the evidence in the cautioned statement which belongs to the appellant has not been subjected to any cross-examination as the appellant has yet to give evidence. This was ruled by the Federal Court in *Public Prosecutor v Adetunji Adeleye Sule* [1993] 2 MLJ 70; [1993] 3 CLJ 113 which held that:

A In the same way, in a case where the onus lies on an accused to rebut a statutory presumption, a voluntary out of court statement by the accused — and this would include a cautioned statement — which is wholly exculpatory should not be made the foundation of an order of acquittal especially at the close of the case for the prosecution, since, at that stage, the accused not having given evidence himself, his B explanations could not be tested by cross-examination.

[61] At the end of the defence case however, the burden imposed on the appellant was to rebut the presumption under s 37(d) of the DDA 1952 on the issue of possession on a balance of probabilities and raised a reasonable doubt C on the issue of trafficking.

[62] From the grounds, we found that the learned trial judge had applied the correct burden of proof that was required of the appellant and had given the defence sufficient judicial evaluation. Her Ladyship's analysis of the defence D can be found at paras 47–53 of her grounds.

[63] The learned trial judge disbelieved the defence that she was an innocent carrier as her defence was a bare denial and she was not an innocent carrier.

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[64] Essentially the defence of the appellant is that her employer She Be instructed her to send some stationaries to Malaysia to a person, the details of which was unknown to the appellant. This fact was never disclosed to the raiding officers, PW6 and PW7 when she was detained at the airport. F Therefore this amounted to an afterthought.

[65] The appellant's act was an act of wilful blindness. The luggage bag P34 was brought by a stranger (a black man) and given to her by her employer to be taken to Malaysia and that she was rewarded handsomely to do the task of G transporting the bag which the appellant said contained stationeries to Malaysia. The luggage bag was checked in by the appellant when she arrived at the airport before taking the flight to Malaysia. Although the luggage bag was checked in, it was never locked. That is not the normal act of someone who checked in luggage when taking a flight. Before the appellant checked in the H luggage, P34, she had ample opportunity to check the contents when she was on the way to the airport, if she wished to, but she failed to do so (see *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240). Clearly the appellant shut her eyes to the obvious as she could not care to know what was the contents in the luggage bag which was to be carried across the globe, I although the circumstances and the manner the luggage bag, P34 was given and to be delivered to someone in Malaysia appeared to be suspicious. The contents of the luggage bag was children's clothing and things. Why the need to send these things to Malaysia to someone whom the appellant did not know the details of, through the appellant, when it could have been cheaper and

easier to have it couriered or She Be/the black man could have carried the luggage bag themselves to Malaysia? In addition, that was her first flight to Malaysia from Guangzhou, China, and evidence show that the appellant was afraid to go to the airport alone that she had to seek her friend Liang Ya Shui to accompany her to the airport. However she did not seem to mind travelling alone (although that was her first time) to a foreign country. Why take all these risks and trouble? The appellant was paid three times her salary merely to deliver childrens' clothes and marker pens to Malaysia. The luggage bag, P34 was brought by a black man whom the appellant did not know. She was only told to go to a hotel in Malaysia. The trip was a last minute hurried trip when she was contacted by She Be that she was supposed to make an overseas trip and it was only at 12.30 that the appellant was told that she was to make a trip to Malaysia on 7 January 2014. These are facts which constituted reasons for suspicion about the true nature of the purpose of the trip but the appellant appeared not to be concerned.

[66] Hence, the learned trial judge found that it was odd that the appellant was not suspicious of the contents in the luggage bag considering the facts as to how she was given the luggage bag by She Be. There was no explanation as to why she did not check the contents of the bag when she had the opportunity to do so, save an except that she said there was not enough time, but from the evidence she did have the opportunity to check while on her way to the airport. The learned trial judge said that 'The surreptitious manner in which he put her on the flight to Kuala Lumpur with the luggage bag was so suspect that any reasonable person would have gone one step further and ascertained himself what precisely was in the luggage bag ... The only reason why she failed to do was because she either knew that the drugs were concealed in the luggage bag or she did not care to know'.

[67] We agreed with the findings of the learned trial judge that the only reasonable conclusion that can be drawn from the aforesaid facts is that appellant was fully aware of what she was carrying and was aware of the presence of the drugs concealed in the marker pens in the bag. We find no reason to disagree with the findings of the learned trial judge in this respect as there was no flaw in Her Ladyship's reasonings to arrive at such conclusion. Therefore the defence of an innocent carrier fails as there were grounds which raised suspicion and the appellant failed to show she has no reasons to suspect that she was carrying drugs.

[68] The appellant's cautioned statement, D127 did not contain any details of the person whom she was supposed to deliver the bag to. There was also no details of the black man, She Be. The appellant did not know what was She Be's full and real name, the telephone number or contact number or his address. Therefore how could the investigating officer, PW8 verify the existence of She

Be without the details and the defence of the appellant as disclosed in the cautioned statement, when there was hardly any particulars for PW8 to pursue his investigation. In the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 this court at p 215 held that:

> Thus, the evidence suggest that the first opportunity the appellant had to explain was at the time he was interviewed, and his cautioned statement recorded from him the day after his arrest. There was, therefore, no evidence of delay on his part in offering an explanation. On the other hand, evidence suggests that such delay, as there was in this regard, had been occasioned entirely by the police. It follows that it was wrong for the judge to have assumed, contrary to the evidence, that there had been a belated disclosure of the defence, which suggested concoction. On the contrary, the evidence indicates that, given the circumstances, the appellant had made prompt disclosure of his defence in his cautioned statement.

Clearly, this 'Alcontara Notice' which was given to the prosecution was insufficient for the investigating officer to further pursue in his investigation.

[69] From the defence adduced by the appellant, there was no evidence adduced by the appellant to show that She Be existed. Due to the insufficiency of the details given to the investigating officer as to the character She Be, the investigating officer cannot be faulted for failing to pursue further in his investigation. Even the friend, Liang Ya Shui was never called by the appellant to support her story as stated in the cautioned statement.

[70] The defence had a legal burden to disprove knowledge and it was the duty of the defence to call upon She Be to give evidence to support her story that it was She Be who gave her the luggage bag, P34 which contained the drugs. There was no way the court could verify the truthfulness of the appellant's story without the appellant producing She Be as a witness.

[71] Therefore the findings of the learned trial judge who disbelieved the credence of the appellant's narrative of the events that led her into possession of the luggage bag, P34 was not flawed. The learned trial judge did not give weight to the appellant's version due to the failure of calling She Be and Liang Ya Shui to corroborate her story.

[72] On the issue of the appellant's conduct which allegedly cooperated in the investigation and that she was not reluctant to open the luggage bag upon inspection; the learned trial judge considered this aspect of the defence and found that it does not necessarily infer that the appellant did not have knowledge of the drugs nor her guilt. We do not see any reason to disturb such findings.

[73] The contemporaneous conduct of the appellant must be seen in the light of the circumstances at the material time. The area where the appellant

was seen carrying the luggage bag, P34 and arrested subsequently, was the arrival area of incoming passengers from overseas and passengers are normally subjected to inspection before exiting from the airport terminal. The security in the airport area was tight and restricted and there was no room for the appellant to make any escape, even if she had wanted to. In this respect, the Federal Court had made observations in *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741 where it held that:

> [4] First, he contended that the High Court and the Court of Appeal had failed to consider the contemporaneous conduct of the appellant in not trying to escape or putting up a struggle with the police when confronted by PW5 and his men or attempting to disassociate or discard the backpack containing the dangerous drugs. Such conduct, if considered by the courts below, could infer that the appellant had no knowledge of the said drugs in the backpack.
>
> [5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600–800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason there is no misdirection by the courts below.

[74] The learned trial judge had considered the appellant's submission as to her conduct which should be applied in favour of the appellant and as to the contents of the message in her phone wherein she had sent to her boyfriend after her arrest stating that she was in trouble and had been cheated; and found no merits in the submission. The learned trial judge referred to this court's decision in *Deon Jacobus Alfred Cornelius* which held that evidence of conduct or demeanour is inconclusive in showing a person's guilt or innocence.

[75] We found that there is no misdirection nor error in the findings of the learned trial judge that for the aforesaid reasons the appellant failed to rebut the presumption under s 37(d) of the DDA 1952 on the issue of possession and failed to raise reasonable doubt on the issue of trafficking. Therefore the learned trial judge did not err when Her Ladyship found that the appellant had not raised any reasonable doubt in her mind as to the appellant's guilt.

[76] The conviction and sentence of the appellant is safe and we affirmed the decision of the learned trial judge. The appeal by the appellant was dismissed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar